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№ 07-836

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS ESPINOLA, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should district judges give the United States Sentencing Guidelines "presumptive" or "substantial" weight?

2. Should a more severe sentence be permitted to be based on facts proven by a mere preponderance of the evidence rather than beyond a reasonable doubt?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Carlos Espinola respectfully petitions for a writ of certiorari to review the judgment against him of the United States Court of Appeals for the First Circuit.

OPINION BELOW

The opinion of the court of appeals (App. 1a-5a) is not reported in the Federal Reporter but is reported at 2007 U.S. App. LEXIS 22846 (1st Cir. 2007).

JURISDICTION

The court of appeals entered its judgment on September 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides: "No person shall be ... deprived of life, liberty, or property, without due process of law."

The Notice and Jury Trial Clauses of the Sixth Amendment provide: "In all criminal prosecutions, the accused shall enjoy the right to a ... public trial, by an impartial jury ... and to be informed of the nature and cause of the accusation ...."

Title 18 of the United States Code, Section 3553(a) provides:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider —
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for –
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made

to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar

records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

Petitioner Carlos Espinola was indicted and convicted by a jury of conspiring to distribute an unspecified quantity of oxycodone, a Schedule II opiate. 21 U.S.C. §§ 841(b)(1)(C), 846.

Petitioner was sentenced after *United States v. Booker*, 543 U.S. 220 (2005). Under the United States Sentencing Guidelines, the facts found by the jury's verdict led to an Offense Level of 12. U.S.S.G. § 2D1.1(c)(14). Since Petitioner was in Criminal History Category I, his verdict-based Guidelines-Sentencing-Range ("GSR") was 10-16 months.

Over Petitioner's objections, the sentencing judge (who also was the trial judge) found additional facts – the presence of a working firearm and drug quantity – by a preponderance of the evidence. The judge calculated drug quantity based on what she described as "wildly ranging estimates." Those added facts increased Petitioner's Offense Level to 36. As a result, his GSR was increased to 188-235 months. U.S.S.G. §§ 2D1.1(b)(1), 2D1.1(c)(3).

The sentencing judge characterized the increased GSR as being the "presumptive result," "a range of months within which I should sentence

unless there are reasons to go away." She explained that "there is a limit in how far I can go away, either up or down from this range ...."

Referring to other statutory factors in 18 U.S.C. § 3553(a), but not to the "parsimony principle" that a sentence should be "sufficient, but not greater than necessary," the judge imposed a sentence below the increased GSR. Still, Petitioner received a sentence some 132 months longer than the top of the verdict-based-GSR.

The First Circuit Court of Appeals rejected Petitioner's argument that Fifth Amendment Due Process required the added facts to be found beyond a reasonable doubt. The appellate court relied on *United States v. Malouf*, 466 F.3d 21, 27 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 1892 (2007) which had relied on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). (App. 2a).

The appellate court recognized that using the GSR as the "presumptive result" was wrong. (App. 4a). The First Circuit has held that the Guidelines should not be "presumptively controlling," but are "an important consideration," should be given "substantial weight," and "cannot be called 'just another factor' in the statutory list...." *United States v. Jiménez-Beltre*, 440 F.3d 514, 516, 518 (1st Cir. 2006) (en banc), *cert. denied*, 127 S. Ct. 1907 (2007).

However, Petitioner's case was not remanded for resentencing. The appellate court thought it was

clear from "the sentencing proceeding as a whole," *i.e.*, from the judge's consideration of other factors under 18 U.S.C. § 3553(a) and from the imposition of a below-GSR sentence, "that the court understood the proper role of the guidelines." (App. 5a).

REASONS FOR GRANTING THE PETITION

1. Contrary to *United States v. Booker*, 543 U.S. 220 (2005) and its progeny, the Sentencing Guidelines were given "presumptive" or at least "substantial" weight.

In 2005, this Court held that sentencing judges should "consider" the Guidelines as being "effectively advisory." *Booker*, 543 U.S. at 245.

Last Term, *Rita v. United States*, 551 U.S. __, __,127 S. Ct. 2456, 2465 (2007) prohibited district judges from treating the Guidelines presumptively.

This Term, *Kimbrough v. United States* held that the Guidelines are "one factor among several courts must consider in determining an appropriate sentence;" and that all of the Guidelines – not just the ultimate GSR – are "advisory only." 552 U.S. __, __, 2007 U.S. LEXIS 13082 at *13, *14 (2007). The drug quantity Guidelines, in particular, are advisory because they were not developed like other Guidelines based on historic sentencing practices, but were keyed to mandatory minimum statutes. *Id* at *22-*23. At most, the Guidelines are the "starting point and initial benchmark." *Id* at *43. Justice

Scalia's concurrence rejected putting "any thumb on the scales" in favor of the Guidelines. *Id* at *51.

In *Gall v. United States*, 552 U.S. __, __, 2007 U.S. LEXIS 13083 at *37 (2007) this Court similarly held that "the Guidelines are only one of the factors to consider when imposing sentence."

None of these cases instructed district judges to give the Guidelines disproportionately heavy weight. *Kimbrough* and *Gall* were explicit that the Guidelines were just one factor to be considered.

Contrary to *Booker* and its progeny, the district judge in Petitioner's case gave the Guidelines disproportionately heavy weight. She was explicit that she considered the GSR to be the "presumptive result," "a range of months within which I should sentence unless there are reasons to go away;" but that "there is a limit in how far I can go away, either up or down from this range ...."

The district judge did not realize what *Kimbrough* now makes clear: that she could reject the drug quantity Guideline if she had reasons for doing so.

Also contrary to *Booker* and its progeny, the court of appeals gave the Guidelines disproportionately heavy weight. Petitioner's sentence was affirmed based on circuit precedent under which district judges were to give the Guidelines "substantial weight."

That circuit precedent then was a minority view. Now it is clearly contrary to this Court's opinions, especially the holdings in *Gall* and *Kimbrough*.

In Petitioner's case, even though the GSR was weighed heavily, the district judge decided that a sentence below the GSR was "reasonable." The Government did not appeal that sentence. If Petitioner's GSR had not been given disproportionately heavy weight, as if the district judge had started from a lower GSR, the GSR would not have been a limiting gravitational force, and an even lower – but still reasonable – sentence could have been imposed. *C.f., United States v. Story*, 503 F.3d 436, 440 (6th Cir. 2007) (remand required where GSR was incorrectly set too high because, even though a below-GSR sentence was imposed, "it is certainly possible that the overall sentence was incorrect as well.")

This Court should grant the Petition and remand for resentencing without presumptive consideration of the Guidelines and without giving the Guidelines "substantial weight."

2. Sentencing fairness will be increased by applying the Fifth Amendment Due Process right to proof beyond a reasonable doubt to sentence-increasing facts in an advisory Guideline system.

"It has been settled throughout our history that the Constitution protects every criminal

defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Booker*, 543 U.S. at 230, *quoting In re Winship*, 397 U.S. 358, 364 (1970).

The reasonable doubt standard plays "a vital role in the American scheme of criminal procedure" and "is a prime instrument for reducing the risk of convictions resting on factual error." *Winship*, 397 U.S. at 363-364.

Winship's Due Process protections extend to determinations that affect the length of a sentence. *Mulaney v. Wilbur*, 421 U.S. 684, 697-698 (1975); *Apprendi v. New Jersey*, 530 U.S. 466, (2002).

The Third Circuit *en banc* recently divided on whether proof beyond a reasonable doubt is required when added facts result in longer sentences. *United States v. Grier*, 475 F.3d 556 (3d Cir.), *cert. denied*, 128 S.Ct. 106 (2007). The Ninth Circuit *en banc* requires clear and convincing evidence for extremely disproportionate sentence enhancements. *United States v. Lynch*, 437 F.3d 902, 916 (9th Cir. 2006).

Whenever there is a Sixth Amendment right to a jury trial, the Fifth Amendment Due Process right to proof beyond a reasonable doubt follows naturally. But the Fifth Amendment Due Process right to proof beyond a reasonable doubt applies even when the Sixth Amendment right to a jury does not. *Winship* itself applied the beyond-a-reasonable-doubt

requirement to non-jury juvenile matters. Similarly, even though a jury trial is not required in petty criminal cases (*i.e.*, where the potential punishment could not exceed six months in jail, *see, e.g., United States v. Nachtigal*, 507 U.S. 1, 4 (2002)), proof beyond a reasonable doubt still is constitutionally required. *Hicks v. Feiock*, 485 U.S. 624, 632 n. 5 (1988).

Why should a defendant charged with a serious federal offense be entitled to less protection than one charged with a petty offense? A defendant charged with a petty offense such as driving under the influence of liquor in a National Park cannot fairly be sentenced to serve a single day in jail unless the fact of the degree of his or her impairment has been proven to a judge beyond a reasonable doubt. A defendant charged with a serious federal crime can be sentenced to serve a longer sentence even though similar facts are not proven to any factfinder beyond a reasonable doubt.

In Petitioner's case, the factual findings of firearm presence and drug quantity added more than a decade to his sentence. Those facts were essential to exposing Petitioner to increased punishment beyond that permitted by the jury's verdict. Without those facts, Petitioner's verdict-based GSR was only 10-16 months. A longer sentence would not have been "reasonable" without some justification.

The procedural protection of proof beyond a reasonable doubt accompanies facts supporting

punishment. *United States v. Reese*, 92 U.S. 214, 232 (1875) (Clifford, J., concurring) ("[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted."); *United States v. Kandirakis*, 441 F. Supp. 2d 282, 303 (D. Mass. 2006) ("If the law identifies a fact that warrants deprivation of a defendant's liberty or an increase in that deprivation, such fact must be proven to a jury beyond a reasonable doubt.").

The procedural protection of proof beyond a reasonable doubt is deeply rooted.

> Every wrongful fact, with each particular modification thereof, which, in law, is required to be taken into the account in determining the punishment upon a finding of guilty, must be alleged in the indictment... This doctrine is fundamental. Originating in natural reason and abstract justice, it has been adopted into the common law and confirmed by our written constitutions.

1 Joel Prentiss Bishop, Bishop's New Criminal Procedure 77(1)-(2), at 47 (4th ed. 1895).

In Petitioner's case, drug quantity and firearm presence were facts "legally essential to the punishment to be inflicted" and "wrongful fact[s]" that served to increase his punishment. Petitioner was entitled to have those facts proven beyond a reasonable doubt.

This Court has drawn a distinction between factual elements of an offense which must be proven beyond a reasonable doubt, and other facts which may affect a sentence *within a statutory maximum* but which need not be proven beyond a reasonable doubt. For example, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) held that the state could properly impose a mandatory minimum sentence where a judge found by a preponderance of the evidence that a firearm had been visibly possessed.

The critical point is that the "statutory maximum" referred to is not the maximum in the statute book, but the ceiling of the guideline range set for a particular set of facts. *Harris v. United States*, 536 U.S. 545, 557 (2002) distinguished *McMillan* from *Apprendi v. New Jersey*, 530 U.S. 466 (2000) by explaining that any fact raising the sentencing ceiling beyond the maximum authorized by the jury's verdict (such as by moving a defendant into a different sentencing range with a higher ceiling as in *Apprendi*) must be considered an element of an aggravated crime which had to be found by the jury and proven beyond a reasonable doubt. Any fact raising only the sentencing floor (such as by increasing the mandatory minimum as in *McMillan*) did not.

In Petitioner's case, the findings of drug quantity and firearm presence were aggravating facts that both raised the sentencing floor from 10 months to 188 months, and raised the sentencing

ceiling from 16 months to 235 months. *McMillan* does not control.

Harris held that "[j]udicial factfinding in the course of selecting a sentence within the authorized range does not implicate the ... reasonable-doubt component[] of the Fifth ... Amendment." 536 U.S. at 558. However, *Harris* did not authorize judicial factfinding by a preponderance of the evidence to select an authorized sentencing range as was done in Petitioner's case.

Harris and *Booker* followed a line of cases starting with *Jones v. United States*, 526 U.S. 227, 243 (1999) which established the bedrock holding that:

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Justice Stevens' *Booker* majority opinion reaffirmed that holding. 543 U.S. at 244. The Court continues to follow that holding. *Cunningham v. California*, 127 S. Ct. 856, 860 (2007).

As *Jones* makes clear, that bedrock holding is rooted in *both* the Fifth Amendment right to due process and the Sixth Amendment right to a jury

trial. However, *Booker* presented and decided only a Sixth Amendment challenge. 543 U.S. at 226, 245.

Neither *Booker* nor any other case from this Court has decided how the Fifth Amendment Due Process right functions under advisory sentencing guidelines. Justice Thomas' dissent in *Booker* expressly referred to the Fifth Amendment's requirement of proof beyond a reasonable doubt. He characterized as "mistaken" the Sentencing Commission's belief (reflected in the commentary to U.S.S.G. § 6A1.3) "that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." 543 U.S. at 319 n. 6.

If the *Booker* remedy had been to require a jury verdict or plea admission of facts increasing the GSR, both Sixth Amendment and Fifth Amendment defects of the Guidelines would have been cured. *Booker*'s remedy of making the Guidelines "effectively advisory" based on judge-found facts only remedied the Sixth Amendment defect. It did not remedy the Fifth Amendment Due Process defect that had co-animated *Jones* and its progeny.

Even if the reasonable doubt standard is not mandated by the Fifth Amendment, under a truly advisory regime, sentencing judges should have discretion to require that facts which significantly increase the GSR be proven by significantly stronger evidence. *See, e.g.., Grier,* 475 F.3d at 587 (Ambro, J.,

concurring in the judgment); *United States v. Kandirakis*, 441 F.Supp.2d 282, 325 (D. Mass. 2006). The district judge in Petitioner's case did not recognize that she had such discretion.

The holding of *United States v. Tucker*, 404 U.S. 443, 446, 447 (1972) – that a sentencing judge can "appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come" so long as it is not "materially untrue" – is not to the contrary. Tucker's case had been remanded for resentencing because there was "a reasonable probability" that uncounseled prior convictions may have led the trial court to impose a longer sentence than it otherwise would have imposed. *Id* at 445-446. This Court affirmed because the uncounseled prior convictions were "misinformation of constitutional magnitude." *Id* at 447. The "misinformation" was not only the false assumption that Tucker's prior convictions had been lawful, but also the failure to consider that they had been constitutionally infirm. *Id* at 448. *Tucker* did not address the standard of proof a judge should require before a fact is relied upon for sentencing.

United States v. Watts, 519 U.S. 148 (1995) would not have to be overruled to permit proof beyond a reasonable doubt. *Watts* held that, for purposes of Double Jeopardy, an acquittal was not a factual finding and did not prevent the sentencing court from considering conduct underlying the acquitted charge so long as the conduct was proven

by a preponderance of the evidence. 519 U.S. at 155, 157. As Justice Stevens' *Booker* majority noted, *Watts* "presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument" and did not involve a situation where "the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment." 543 U.S. at 240 and n.4 (citation omitted). The Sixth Circuit recently ordered rehearing *en banc* of *United States v. White*, 503 F.3d 487 (6th Cir. 2007), a case considering the use of acquitted conduct under advisory guidelines. "Sixth Circuit going en banc on acquitted conduct enhancements," *Sentencing Law and Policy Blog*, November 30, 2007, available at: http://sentencing.typepad.com/sentencing_law_and_policy/2007/week48/index.html.

This Court should grant the Petition, decide that the sentencing judge must as a matter of Fifth Amendment Due Process (or may as a matter of discretion) require proof beyond a reasonable doubt to establish sentence-increasing facts, and remand Petitioner's case for resentencing.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 06-2340
UNITED STATES OF AMERICA,
Appellee,

v.

CARLOS ESPINOLA,
Defendant, Appellant.

Appeal From The United States District Court For The District Of Massachusetts

[Hon. Rya W. Zobel, U.S. District Judge]

September 27, 2007

Per Curiam. Defendant Carlos Espinola ("Espinola") appeals from his 148-month, below-guidelines sentence for conspiring to distribute oxycodone[1] in violation of 21 U.S.C. §§ 841(a), 846. On appeal, Espinola seeks resentencing on the grounds that the district court (1) violated his due process rights by making factual findings by a

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[1]Oxycodone is a Schedule II drug, see 21 U.S.C. § 812(c); 21 C.F.R. § 1308.12, marketed as OxyContin, United States v. Wall, 349 F.3d 18, 20 (1st Cir. 2003).

preponderance of the evidence rather than beyond a reasonable doubt; (2) clearly erred in calculating the drug amount attributable to him and in finding that he possessed a firearm during the commission of the offense; (3) violated Federal Rule of Criminal Procedure 32(i)(1)(a) by failing to verify that he had read and discussed the Presentence Report ("PSR") with his counsel; (4) abused its discretion in refusing his mid-sentencing request for a continuance to gather additional evidence; and (5) erred in giving presumptive weight to the guidelines. We will consider those arguments in that order.

Espinola's argument that due process requires that sentencing-enhancing facts, including drug weight, be found beyond a reasonable doubt has already been rejected by this court in United States v. Malouf, 466 F.3d 21, 27 (1st Cir. 2006) (decided after United States v. Booker, 543 U.S. 220 (2005)), cert. denied, 127 S. Ct. 1892 (2007). See also United States v. Goodine, 326 F.3d 26, 32 (1st Cir. 2003) (finding the "tail-wagging-the-dog" rationale for a higher burden of proof inapplicable to judicial determinations of drug weight). This panel is not free to revisit the issue. Malouf, 466 F.3d at 27.

We review the district court's factual findings for clear error. United States v. Santos, 357 F.3d 136, 141 (1st Cir. 2004). Under that highly deferential standard of review, "if there are two plausible views of the record, the sentencing court's choice between them cannot be clearly erroneous." Id. Deference to a district court's determination of drug weight for sentencing purposes is particularly appropriate since "a determination need not be exact,

but, rather, may be approximate, as long as the approximation represents a reasoned estimate." Id. Nor must the district court "discuss the reasoning underpinning its factual finding as to amount (e.g., inferences and credibility determinations)." United States v. Navedo-Concepción, 450 F.3d 54, 59 (1st Cir. 2006). The standard for increasing the offense level where a firearm is possessed in connection with a drug offense is similarly undemanding; the "adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2B1.1, comment. (n.3).

Under those standards, the challenged factual findings readily withstand appellate review. Our review of the record, including the transcript of Espinola's trial, at which the sentencing judge presided, confirms that the district court's estimate of drug weight was reasonable, conservative, and amply supported by the evidence. We also find reasonable the court's inference that the gun that Espinola undisputedly possessed for security during drug transactions was real rather than a toy or a replica.

Espinola next faults the district court for failing, at sentencing, to "verify that the defendant and the defendant's attorney ha[d] read and discussed the presentence report and any addendum to the report," as required by Rule 32(i)(1)(A) of the Federal Rules of Criminal Procedure. Because this argument was not raised below, we review only for plain error, United States v. Olano, 507 U.S. 725, 732-34 (1993), and find none. Where, as here, it is

clear from the record that Espinola's counsel was thoroughly familiar with the PSR, "we will not assume that defense counsel did not discuss so critically important a document with his client, especially since appellant claims no such dereliction." United States v. Cruz, 981 F.2d 613, 620 (1st Cir. 1992). Nor has Espinola alleged, much less shown, any prejudice warranting relief under the plain error standard. See United States v. Esparza-Gonzalez, 268 F.3d 272, 273-74 (5th Cir. 2001). As another circuit recognized under similar circumstances, "[t]o remand when no prejudice exists is to require the district court to undergo an exercise in futility in order to obtain the same sentence." United States v. Rangel-Arreola, 991 F.2d 1519, 1526 n.5 (10th Cir. 1993).

Espinola next argues that the district court's failure to grant his mid-sentencing request for a continuance warrants a remand for resentencing. Requests for continuances of sentencing are disfavored given the district court's obligation to "impose sentence without unnecessary delay." Fed. R. Crim. P. 32(b)(1). "A trial court has wide discretion to grant or deny a request for continuance, and so . . . '[o]nly an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay' would amount to an abuse of that discretion." United States v. Fink, 2007 WL 2326822, at *7 (1st Cir. Aug. 16, 2007). The issue on which Espinola sought time to gather additional evidence was mentioned in the PSR, which his counsel received approximately a month before sentencing, and was also raised in Espinola's

sentencing memorandum, filed two weeks before sentencing. Yet Espinola did not seek a continuance until the court ruled against him on this issue during the sentencing hearing. Under those circumstances, there was nothing "unreasoning" or "arbitrary" about proceeding with the sentencing that day.

Finally, Espinola argues that the district court erred in characterizing the applicable guidelines range as "presumptive." In this circuit, no such presumption applies. United States v. Jiménez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (en banc), cert. denied, 127 S. Ct. 1907 (2007). However, it is clear from the sentencing proceeding as a whole, not only from what the court said elsewhere – expressly considering the other factors enumerated in 18 U.S.C. § 3553(a) – but also from what it did – applying those factors in sentencing Espinola three months below the applicable guideline range – that the court understood the proper role of the guidelines as articulated in Jiménez-Beltre and its progeny. Accordingly, no purpose would be served by remanding this case for resentencing under a rephrased standard. See United States v. Jahagirdar, 466 F.3d 149, 157 (1st Cir. 2006).

Affirmed. See 1st Cir. R. 27.0(c).

No. 07-836

In the Supreme Court of the United States

CARLOS ESPINOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 07-836

CARLOS ESPINOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends (Pet. 6) that the district court erroneously applied a presumption of reasonableness to the advisory Sentencing Guidelines range when it sentenced him to a prison term of 148 months, three months *below* his advisory Guidelines range. According to petitioner, the district court stated that the Guidelines range set forth a "presumptive result," within which the court should sentence "unless there are reasons to go away," and that "there is a limit in how far I can go away, either up or down from this range." Pet. 4-5.

In *Rita* v. *United States*, 127 S. Ct. 2456 (2007), this Court held that courts of appeals may apply a presumption of reasonableness in reviewing within-range sentences, *id.* at 2467, but that district courts do "not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." *Id.* at 2465. In *Gall* v. *United States*, 128 S. Ct. 586 (2007), the Court reiterated that a district court "may not

presume that the Guidelines range is reasonable," but instead "must make an individualized assessment based on the facts presented." *Id.* at 596-597. The court of appeals, in a decision issued before *Rita* and *Gall*, stated that "[i]n this circuit, no such presumption [of reasonableness] applies," but proceeded to find that, despite the district judge's characterization of the Guidelines, based on the entire sentencing record, the judge "understood the proper role of the guidelines" as articulated in circuit law, and, accordingly, "no purpose would be served by remanding this case under a rephrased standard." Pet. App. 5a.

In *United States* v. *Booker*, 543 U.S. 220, 268 (2005), this Court made clear that even a judge's erroneous application of mandatory guidelines may not require resentencing under the "harmless-error doctrine," and it follows *a fortiorari* that even a judge's erroneous articulation of a presumption in favor of a Guidelines sentence may be found harmless if the entire record reveals that the court understood the scope of its discretion under Section 3553(a) and imposed a properly individualized sentence. In this case, the district court imposed a below-range sentence, and the court of appeals determined that either the judge's characterizations of the Guidelines did not impede the judge's ability to apply the Section 3553(a) factors or that any erroneous articulation of a presumption of reasonableness was harmless in light of the court's actual application of the Section 3553(a) factors and its imposition of a below-range sentence. Pet. App. 5a.

Nothing in *Rita* or *Gall* necessarily calls the court of appeals' judgment into question. Neither *Rita* nor *Gall* precludes harmless-error review, and neither decision makes the Guidelines range irrelevant to the district court's exercise of sentencing discretion. To the contrary, *Gall* makes clear the Guidelines range is "the starting point and

the initial benchmark," 128 S. Ct. at 596, and that "[i]f [a judge] decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance," *id.* at 597. The Court also found it "uncontroversial that a major departure should be supported by a more significant justification than a minor one." *Ibid.*

Petitioner relies on *Kimbrough* v. *United States*, 128 S. Ct. 558 (2007), in arguing that the district court was unaware of the court's discretion to "reject the drug quantity Guideline if she had reasons for doing so." Pet. 7. But petitioner gives no indication that he gave the district court reasons for doing so or that he preserved any such argument in the court of appeals.

Nevertheless, although the ultimate judgment of the court of appeals may be correct, the court of appeals did not have the benefit of this Court's decisions in *Rita*, *Gall*, or *Kimbrough*. While the court of appeals concluded that the district court "understood the proper role of the guidelines" as articulated in circuit law, Pet. App. 5a, it did not have the opportunity to ascertain whether the district court understood the proper role of the Guidelines as articulated in this Court's later decisions. Accordingly, the petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further consideration in light of *Rita*, *Gall*, and *Kimbrough*, subject to applicable doctrines of waiver, forfeiture, and harmless error.*

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* Petitioner also asserts (Pet. 8-16) that facts pertinent to advisory Guidelines calculations should, as a matter of due process, be found beyond a reasonable doubt. He alleges no circuit split on that issue, and this Court has frequently denied review of that issue. See, *e.g.*, *United*

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

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States v. *Grier*, 475 F.3d 556 (3d Cir.) (en banc), cert. denied, 128 S. Ct. 106 (2007). The government waives any further response to the petition unless this Court requests otherwise.